82-849

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the United States may be collaterally estopped from litigating a question of constitutional law of public importance by the judgment of a district court in a prior case, involving different parties, in which the question was resolved adversely to the United States.

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v.

SERGIO ELEJAR MENDOZA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-21a) is reported at 672 F.2d 1320. The opinion of the district court (App. B, *infra*, 22a-24a) is not officially reported. The findings of fact, conclusions of law, and recommendations of the designated naturalization examiner (App. C, *infra*, 25a-33a) are likewise unreported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 34a) was entered on April 2, 1982, and a timely petition for rehearing was denied on July 22, 1982 (App. E,

infra, 35a). On October 13, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 701, 702 and 705 of the Nationality Act of 1940, as amended, ch. 199, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005; Section 310(e) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1421(e); and 28 C.F.R. 0.20 are reproduced in Appendix G, *infra*, 43a-45a.

STATEMENT

Respondent, a Filipino national, entered the United States in 1975 in a nonimmigrant status. On May 10, 1978, after other legal avenues intended to prolong his stay in the United States had been exhausted or abandoned, respondent filed a petition for naturalization under Section 701 of the Nationality Act of 1940, a provision then no longer in force that had relaxed the normal requirements for naturalization for certain individuals who fought in the United States armed forces in World War II. Respondent claimed that under Section 701 he was entitled to naturalization based upon his service during World War II in the Army of the Commonwealth of the Philippines. The designated naturalization examiner recommended that the petition be denied, noting that respondent was not eligible for naturalization under the provisions of the Immigration and Nationality Act of 1952 then in effect and that naturalization under Section 701 of the 1940 Act was unavailable because petitioner had not filed for naturalization by December 31, 1946, the expiration date of that provision. The examiner also rejected respondent's argument that naturalization was necessary to remedy an alleged denial of due process in the adminis-

tration of Section 701 in the Philippines at the close of World War II.

The district court rejected the naturalization examiner's recommendation and granted the petition without reaching "the Constitutional issues or other merits of the petition" (App. B, *infra*, 22a). The district court concluded that the United States was collaterally estopped to oppose respondent's naturalization petition because the constitutional question presented by the petition had been resolved adversely to the United States in a case involving the naturalization petitions of different individuals, *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975). The court of appeals affirmed, basing its decision solely upon collateral estoppel grounds.

A. The Background of this Case

1. Respondent served with the Philippine Commonwealth Army as a physician from December 1, 1941, until June 30, 1946. During that time, as the United States became involved in World War II, the Commonwealth Army, which was ordinarily under the control of the semi-autonomous Commonwealth government,[1] was incorporated into the armed forces of the United States pursuant to the order of President Roosevelt. Respondent was held prisoner by Japanese forces from April 1942 until February or March 1945. Upon his release respondent remained in the Commonwealth Army. In the fall of 1945 the United States Army sent respondent to Pennsylvania for approximately six months of medical training. Shortly after his return to the Philippines, on

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[1] Pursuant to Section 10(a) of the Philippine Independence Act of 1934, ch. 84, 48 Stat. 463, the Philippines were scheduled to become a fully independent, self-governing nation on July 4, 1946. Although a United States possession prior to that date, the Philippines enjoyed considerable autonomy under the terms of the Independence Act.

June 30, 1946, respondent secured his discharge from the Commonwealth Army (App. A, *infra*, 7a).

2. The statute upon which respondent's petition for naturalization rests is Section 701 *et seq.* of the Nationality Act of 1940, 8 U.S.C. (Supp. V 1945) 1001 *et seq.*, as added by the Second War Powers Act, 1942, ch. 199, 56 Stat. 182-183. Section 701 exempted certain alien servicemen who served honorably in the United States armed forces during World War II in locations beyond the continental limits of the United States from some of the usual requirements for naturalization, including literacy in English and a period of residence in the United States. As amended by Section 202 (c) (1) of the Act of Dec. 28, 1945, ch. 590, 59 Stat. 658, the Act specified that any petition under Section 701 had to be filed no later than December 31, 1946. Section 702 of the 1940 Act provided for the overseas naturalization of persons in the United States armed forces who were eligible for naturalization under Section 701 but who were beyond the jurisdiction of the United States naturalization courts. Under Section 702, representatives designated by the Commissioner of Immigration and Naturalization were authorized to receive petitions, conduct hearings, and grant naturalization outside the United States.

Pursuant to Section 705 of the 1940 Act, the Commissioner and the Attorney General implemented the provisions of Sections 701 and 702. Between 1943 and 1946 immigration officers traveled on rotation through Great Britain, Ireland, North America and the Pacific Islands, admitting thousands of foreign nationals serving in the United States armed forces to citizenship. Naturalization of alien servicemen in the Philippines, however, was impossible during the Japanese occupation.[2] The liberation

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[2] Between 1942 and 1945, approximately 7000 Filipino servicemembers were naturalized under Section 701 at locations outside the occupied Philippines.

of the Philippines by Allied forces began in February 1945. After resolution of some uncertainties as to the applicability of Section 701 to Filipino servicemen,[3] the Immigration and Naturalization Service, in early August 1945, designated George Ennis, an American vice-consul in Manila, to naturalize aliens pursuant to Section 702. Almost immediately, the Philippine government expressed its concern to the State Department about the possibility that large numbers of young Filipino men, perhaps as many as 250,000, would be naturalized and leave for the United States on the eve of the scheduled Philippine independence (see page 3, note 1, *supra*). On September 13, 1945, the Commissioner of Immigration and Naturalization recommended to Attorney General Clark that the situation be handled by revoking the authority previously granted to Vice-Consul Ennis. The Attorney General approved the Commissioner's recommendation on September 26, 1945, and Ennis' authority to naturalize alien servicemen was thereafter revoked. Naturalizations ceased by October 27, 1945.

The INS subsequently reconsidered and abandoned its prior position (see note 3, *supra*) that members of the Commonwealth Army were eligible for naturalization

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[3] One question was whether service in the Army of the Commonwealth of the Philippines qualified as service in the military forces of the United States for purposes of Section 701. Doubt existed because the Army of the Commonwealth, an instrumentality of the Philippine government, was simply incorporated as a unit into the United States armed forces by Presidential order. By contrast, a separate unit known as the Philippine Scouts was an integral unit of the United States Army; its members had thus individually enlisted in the armed forces of the United States, and their status for this purpose was comparatively free from doubt. In 1945 the INS concluded that members of both Philippine units were covered by Section 701 (but see pages 5-6 & note 4, *infra*). A second question concerned the eligibility for naturalization under Section 701 of Filipinos who had never resided in the United States. The Attorney General concluded that prior residence in the Philippines, then an American possession, satisfied the statute's requirements on that score.

under Sections 701 and 702.[4] Under the revised administrative interpretation, the foreign relations difficulties posed by the presence of a naturalization officer in the Philippines were substantially reduced. Accordingly, in August 1946 the Service again designated a naturalization representative for the Philippines. The representative remained there until December 1946 and naturalized many Philippine Scouts (see page 5 note 3, *supra*) who were still on active duty at that time and were still regarded as eligible under Section 702.[5]

3. Although respondent was present in the Philippines between August and October 1945, when naturalization under Section 702 was possible in the Philippines, it is undisputed that he made no effort to avail himself of that opportunity. Nor did he make any effort to avail himself of the substantive provisions of Section 701, which were available to him without any need for reliance upon the special overseas naturalization provisions of Section 702, during the time he was stationed in Pennsylvania.[6]

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[4] This redetermination was prompted by enactment of the First Supplemental Surplus Appropriation Rescission Act, 1946, ch. 30, 60 Stat. 6, 14, which provided in part that service in the Army of the Commonwealth of the Philippines was not to be deemed service in the United States armed forces for purposes of any United States statute conferring benefits on military veterans. But see page 10 note 9, *infra*.

[5] The First Supplemental Surplus Appropriation Rescission Act (see note 4, *supra*) had no application to members of the Philippine Scouts.

[6] The INS did not adopt its revised interpretation of Section 701, excluding members of the Commonwealth Army from the benefits of that provision, until after the date of respondent's return to the Philippines and his discharge from service.

By the time naturalization was again available in the Philippines under Section 702, respondent was doubly ineligible because he was no longer in service, as well as because the INS regarded service in the Commonwealth Army as nonqualifying under Section 701. Respondent, of course, made no application for naturalization at this time either.

Respondent returned to the United States in 1975 in a nonimmigrant status. His right to remain was extended by the INS through June 9, 1976. During this time respondent operated a restaurant and attempted to start an export-import business. On July 15, 1976, respondent sought to change his status to that of a Treaty Investor. This application was denied by the INS District Director on August 29, 1977, because respondent had not complied with the conditions of his nonimmigrant status. Respondent took an administrative appeal from that decision, but subsequently abandoned that appeal and filed the petition for naturalization under Section 701 at issue in this case.

B. Prior Filipino Veteran Litigation

Because Section 701 required filing of a naturalization petition prior to the close of 1946, its provisons were not the subject of litigation in succeeding years, until a series of novel arguments supporting naturalization resting upon the manner in which Section 702 had been administered in the Philippines gave rise to substantial litigation in the 1970's.[7]

1. In *INS* v. *Hibi*, 414 U.S. 5 (1973), this Court considered the ramifications of that course of administration upon facts strikingly similar to those of the present case. Hibi, a veteran of the Philippine Scouts, entered the United States in 1964 and petitioned for naturalization under Section 701 in 1967. He argued that notwith-

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[7] Section 329 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1440, currently authorizes naturalization of aliens who fought in the United States armed forces during World War II. Unlike its predecessor, Section 701 of the 1940 Nationality Act, however, the benefits of Section 329 are available only to those who either (1) enlisted or were inducted in certain geographical areas (which do not include the Philippines), or (2) are lawfully admitted to the United States for permanent residence. It is accordingly significantly more restrictive than Section 701. Respondent does not meet the requirements of the current provision.

standing 8 U.S.C. 1421(e), which precludes naturalization under provisions of law no longer in effect, the United States was estopped from enforcing the statutory time limit for filing a petition under Section 701 because of an alleged failure to inform him of his opportunity for naturalization, and because of the revocation of Vice-Consul Ennis' naturalization authority in October 1945 and the failure to provide a substitute until August 1946. The district court granted Hibi's petition, adopting his estoppel argument, and the court of appeals affirmed. 475 F.2d 7 (9th Cir. 1973).

This Court summarily reversed, explaining that no estoppel could lie against the government in these circumstances (414 U.S. at 8-9):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress. • • • Here [the INS] has been charged by Congress with administering an Act which both made available benefits of naturalization to persons in [Hibi's] class and established a cutoff date for the claiming of such benefits. [The INS], in enforcing the cutoff date established by Congress, • • • is enforcing public policy established by Congress.
>
> While the issue of whether "affirmative misconduct" on the part of the Government might estop it from denying citizenship was left open in *Montana* v. *Kennedy*, 366 U.S. 308, 314, 315 (1961), no conduct of the sort there adverted to was involved here. We do not think that the failure to fully publicize the rights which Congress accorded under the Act of 1940, or the failure to have stationed in the Philippine Islands during all of the time those rights were available an authorized naturalization representative, can give rise to an estoppel against the Government.
>
> [Hibi's] effort to claim naturalization under a statute which by its terms had expired more than 20 years before he filed his lawsuit must therefore fail.

2a. In *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975) (hereinafter "*68 Filipinos*"), the district court (Renfrew, J.), considered the petitions for naturalization resting upon Sections 701-705 of the Nationality Act of 1940 of 68 Filipino veterans who had served in the Commonwealth Army or the Philippine Scouts during World War II.[8] Rejecting the recommendations of the naturalization examiners, the district court granted the petitions with certain exceptions. The district court first considered the claims of those who it found to have filed preliminary applications for naturalization, which had not been acted upon, before the statutory deadline. 406 F. Supp. at 937-940. As to these "Category I" veterans, the court held in the alternative that: (1) the failure to process the submitted applications was "affirmative misconduct," which, notwithstanding *INS* v. *Hibi*, *supra*, "estopped [the United States] from relying upon the expiration date of Sections 701-705 as grounds for denial of their petitions for naturalization" (*id.* at 939; footnote omitted), and (2) because they had done all that was practical to avail themselves of the opportunity provided by Section 701 at the proper time, these veterans should be deemed to have "constructively filed" their petitions for naturalization within the statutory time limit (*id.* at 940).

The district court defined a second category to include 53 veterans who, like the present respondent, had made no effort to secure naturalization under Section 702 in a timely manner. These "Category II" veterans claimed that the absence from the Philippines of an official empowered to effect naturalizations during the period October 1945 through August 1946 denied them equal protection, in violation of the Due Process Clause of the Fifth Amendment, and required that their tardy petitions be granted. In response the government argued

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[8] *68 Filipinos* was not a class action.

that: (1) Filipinos were unprotected by the Due Process Clause at the time in question because of the enactment, in 1934, of the Philippine Independence Act; (2) the veterans' claims were foreclosed by *INS* v. *Hibi*, *supra*; (3) because Attorney General Clark's decision to withdraw naturalization authority from Vice-Consul Ennis responded to the complaint of a foreign government and was based upon considerations of foreign policy, the veterans' claims presented a nonjusticiable political question; and (4) the Attorney General's action did not violate due process.[9] The district court rejected each of these contentions (406 F. Supp. at 940-951). Although it recognized that "the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands" (*id.* at 951), the court, applying a strict scrutiny standard,[10] held that "the failure of the Government to have stationed in the Philippine Islands a representative of the INS authorized to naturalize members of the American armed forces pursuant to Section 702 of the Nationality Act during all of the time those statutory rights were available denied petitioners due process of law." Thus, the court granted naturalization to all of the petitioners, except for those ("Category III") veterans who were unable to show that they had ever been eligible for naturalization under Section 701 (406 F. Supp. at 937, 951).

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[9] After the decision in *In re Munoz*, 156 F. Supp. 184 (N.D. Cal. 1957), the INS abandoned the argument that provisions of the First Supplemental Surplus Appropriation Recession Act, 1946, rendered the benefits of Section 701 unavailable to veterans of the Commonwealth Army, and did not otherwise argue thereafter that such veterans did not qualify for naturalization under Section 701. Compare pages 5-6 and notes 3 & 4, *supra*.

[10] In the district court's view, absence of a naturalization officer from the Philippines constituted discrimination upon the basis of race, alienage or nationality, and was accordingly subject to strict scrutiny (406 F. Supp. at 950).

b. Pursuant to authority delegated by the Attorney General to determine whether an appeal should be taken from a judgment adverse to the interests of the United States, see 28 C.F.R. 0.20(b), in March 1976 the Solicitor General authorized an appeal from the district court's decision. An appeal was docketed and the case was briefed and readied for oral argument.

In the interim, however, a new Administration had taken office. By memorandum dated September 21, 1977, (App. F, *infra*, 36a-42a), INS Commissioner Castillo sought authorization to withdraw the pending appeal (App. C, *infra*, 30a). Noting that "[t]he desire expressed by the Philippine Government in 1945 to hold onto its young manpower in the post-war period" was no longer an operative consideration, the Commissioner stressed that acquiescence in the naturalization of the *68 Filipinos* petitioners "would be in keeping with the policy of the [new] Administration," described as "a course of compassion and amnesty" (App. F, *infra*, 41a, 42a). Commissioner Castillo's request provoked considerable discussion, and some dissent, within the Department of Justice. The memoranda prepared for the Solicitor General's consideration reflect the conviction that the district court's legal conclusions were legally erroneous, but that acquiescence in naturalization of the petitioners would be an acceptable remedy for the inequities perceived by the officials vested by law with policy making authority and would not affect significant numbers of individuals or establish a binding precedent. In response to these recommendations, on November 14, 1977, the Solicitor General authorized withdrawal of the pending appeal. On November 30, 1977, the court of appeals granted the government's motion to dismiss the appeal.

c. In the aftermath of these events, Commissioner Castillo was questioned upon his recommendation during congressional oversight hearings.[11] The appropriate re-

[11] Commissioner Castillo explained that his recommendation to withdraw the appeal in *68 Filipinos* was based on equitable consider-

sponse to Filipino veterans' naturalization petitions also received extensive reconsideration within the Department of Justice. The position ultimately adopted in 1978, after thorough reexamination, was that the Department would not ordinarily oppose naturalization of Filipino veterans who actually attempted to become naturalized United States citizens pursuant to Sections 701 and 702 while those provisions were in effect—*i.e.*, "Category I" veterans. Contrary to the position adopted in withdrawing the appeal in *68 Filipinos*, however, the Department instructed the INS thereafter to oppose naturalization of those who could not satisfy this prerequisite—*i.e.*, "Category II" veterans. App. C, *infra*, 30a; see *Olegario* v. *United States*, 629 F.2d 204, 214 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).[12]

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ations "aside from the legal argument of, was correct procedure of process used." *Oversight of INS Programs and Activities: Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 272 (1978).

[12] To mitigate the effects of this change in policy, the Department adopted a "grandfather rule" exception for persons who had filed naturalization petitions prior to the withdrawal of the government's appeal in *68 Filipinos*. See *Olegario* v. *United States*, *supra*, 629 F.2d at 214-215. There was reason to believe that processing of at least some such petitions had been delayed by INS, either unilaterally or by agreement with opposing counsel, in anticipation of securing a definitive ruling upon appeal in *68 Filipinos*. It was further recognized that absent that procedure some of the petitions involved would have been granted at the time the government withdrew its *68 Filipinos* appeal. Because it was thought difficult to determine with confidence which petitioners had relied to their detriment upon such procedural understandings, the Solicitor General authorized withdrawal of previously authorized appeals in all cases falling within the "grandfather rule" and declined to authorize appeal in other such cases. Among the appeals withdrawn were those in *In re Nisperos*, 471 F. Supp. 296 (C.D. Cal. 1979); and *In re Colmenar*, No. 308-P-22551 (S.D. Cal. Mar. 20, 1979). See App. A, *infra*, 8a.

3. The issues presented by the tardy filing of naturalization petitions by Filipino veterans resting on Section 701 were considered by the Second Circuit in *Olegario* v. *United States*, *supra*. Adopting Judge Renfrew's reasoning in *68 Filipinos*, the district court had granted Olegario's petition for naturalization, 473 F. Supp. 185 (S.D. N.Y. 1979), and the government appealed.[13] On appeal, the Second Circuit considered the argument that under *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), the decision in *68 Filipinos* should be given collateral estoppel effect, so as to preclude denial of naturalization to any "Category II" Filipino veteran. The Second Circuit rejected this argument, observing that "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern." 629 F.2d at 215. The court observed that the government's failure to appeal an adverse decision may rest upon policy considerations rather than acquiescence in the legal reasoning upon which it rests, and that the invocation of collateral estoppel would compel the Solicitor General to authorize appeal from adverse decisions in an uncritical manner (*ibid.*). The court also stressed that the United States has broad discretion whether to pursue an appeal in a particular case and remain free to reverse its position to correct prior legal positions perceived to have been ill-advised (*id.* at 216). Turning to the merits, the Second Circuit concluded that the absence of a naturalization officer from the Philippines during part of the period when naturalization was available under Section 701 did not violate the statute or work a denial of due process or equal protection. 629 F.2d at 223-233. Accordingly, the Second Circuit reversed the district court and ordered that Olegario's petition be denied.

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[13] Olegario was a "Category II" veteran—*i.e.*, he had not made a timely effort to avail himself of the benefits of Section 701. Nor was his petition filed in time to benefit from the "grandfather rule" adopted by the Solicitor General (see page 12 note 12, *supra*).

C. Proceedings Below

1. Respondent filed his naturalization petition invoking Section 701 of the 1940 Nationality Act on May 10, 1978. The designated naturalization examiner recommended denial of the petition. The examiner noted that respondent could not qualify for naturalization under the current provision for naturalization of alien servicemen, 8 U.S.C. 1440 (see page 7 note 7, *supra*), and that 8 U.S.C. 1421(e) precludes naturalization under expired or superseded statutory authority. Because respondent had not claimed that he sought naturalization under Section 701 in a timely manner, and because respondent had actually been in Pennsylvania for much of the time naturalization was unavailable in the Philippines, the examiner concluded that respondent could not be deemed to have constructively filed his petition under the 1940 Act; respondent's petition was therefore barred by 8 U.S.C. 1421(e). Similarly, given these facts, the examiner found no more basis for an estoppel than was present in *Hibi*, and notwithstanding *68 Filipinos*, found that respondent had not suffered any denial of due process (App. C, *infra*, 25a-33a).

The district court granted respondent's petition without reaching the merits, treating the matter as a routine application of the doctrine of offensive nonmutual collateral estoppel under *Parklane Hosiery Co.* v. *Shore*, *supra*. Although the naturalization examiner had noted (App. C, *infra*, 31a) that the effect of 8 U.S.C. 1421(e) had not been considered in *68 Filipinos*, and that respondent, unlike the *68 Filipinos* petitioners, had been in Pennsylvania for most of the relevant time period, the district court did not address these issues.

2. The Solicitor General authorized an appeal.[14] The government once again argued that respondent's consti-

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[14] Like Olegario, respondent was a "Category II" veteran and had not filed his petition in time to benefit from the Solicitor General's "grandfather rule" (see page 12 note 12, *supra*).

tutional claim was nonjusticiable, and in any event without merit. Several arguments not considered in *68 Filipinos* were also advanced: (1) the constitutional claim was barred by laches; (2) the claim was barred by 8 U.S.C. 1421(e); (3) the remedy awarded for the alleged constitutional violation—naturalization—was tantamount to an equitable estoppel, and thus inconsistent with *Hibi*; and (4) respondent lacked standing to complain of the withdrawal of a naturalization officer from the Philippines, and had suffered no personal deprivation of rights, because he was in Pennsylvania for most of the period in question. The court of appeals affirmed, reaching only the collateral estoppel issue.[15]

The court of appeals concluded that, under *Parklane Hosiery*, the district court did not abuse its discretion in applying collateral estoppel to bar consideration of the government's legal arguments against respondent's naturalization. The court of appeals stated that none of the circumstances listed by this Court in *Parklane Hosiery* (439 U.S. at 329-331 and nn. 14 & 15) as precluding an estoppel was present here. The court also stressed the lack of record support for the government's suggestion that the withdrawal of the appeal in *68 Filipinos* was based in part upon a misapprehension of the practical consequences of doing so, and it questioned whether the underlying issue was, in fact, of sufficient practical importance to warrant a fresh determination of the legal issue (App. A, *infra*, 12a-15a). The court of appeals acknowledged the conflicting decision of the Second Circuit in *Olegario*, but it considered that ruling to be neither persuasive

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[15] The court of appeals stated that because respondent may have been in the Philippines for as much as three months during which time he was eligible for naturalization but no naturalization official was present, "this is * * * sufficient * * * to implicate his due process rights and place him in the same situation as [the] Category II veterans" whose rights were litigated in *68 Filipinos* (App. A, *infra*, 12a n.8). The court did not address the other issues raised by the government that had not been decided in *68 Filipinos*.

respecting the collateral estoppel issue nor reason enough to deny preclusive effect to *68 Filipinos* (*id.* at 16a-18a).

Finally, the court of appeals rejected the government's contentions that *Parklane Hosiery* was inapposite because of the special attributes and interests of the United States as a litigant and the purely legal character of the questions presented here (App. A, *infra*, 18a-20a). Although it acknowledged that "the government is frequently involved in cases raising issues of great public importance, and that in such cases the public interest in permitting the government to relitigate those issues may outweigh the public interest in avoiding needless litigation" (*id.* at 18a), the court concluded that this is not such a case because it found "no 'critical' need for redetermination" of the issue and "no compelling public interest in opposing naturalization" of persons such as respondent (*id.* at 19a, 20a). On the contrary, the court thought that the equities strongly supported preclusion (*id.* at 20a-21a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is without precedent. To our knowledge no other appellate court has ever held that the United States may be estopped from litigating a pure question of law, much less a question of constitutional law affecting the special prerogatives of the Executive in the sphere of foreign relations, by the unappealed adverse decision of a trial level court rendered in a different action involving a different opposing party. If permitted to stand, the decision below would compel a drastic alteration of the federal government's salutary practice of selective pursuit of appeals, thereby imposing a substantial burden upon the courts of appeals and, ultimately, this Court. Moreover, the court of appeals failed to heed this Court's admonition in ~~*United States*~~ v. *Hibi*, 414 U.S. 5, 8 (1973), that "the government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." By con-

trast, the Second Circuit, in considering a claim identical to respondent's, recently refused to apply collateral estoppel to prevent the government from litigating the legal issue. *Olegario* v. *United States*, 629 F.2d 204 (1980), cert. denied, 450 U.S. 980 (1981). This Court should resolve the conflict.

1.a. Contrary to the view of the court of appeals, *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), is not controlling here. In *Parklane Hosiery*, the issues upon which preclusion was upheld were factual (see *id.* at 324); here, the underlying issue in dispute is an unmixed question of law, indeed a significant question of constitutional law. This Court has recognized that powerful considerations militate against extension of the preclusion doctrine to purely legal issues—especially those of constitutional impact—even when the parties in the successive lawsuits are the same. *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979); *United States* v. *Moser*, 266 U.S. 236, 242 (1924). Application of the preclusion doctrine to a legal issue where there is no identity of parties is especially inappropriate.

b. This Court also stated in *Parklane Hosiery* that the courts should refuse to apply nonmutual collateral estoppel in circumstances where such use would for any reason "be unfair to a defendant." 439 U.S. at 331. We submit that the special attributes and role of the United States as a litigant strongly militate against application of the issue preclusion doctrine to the government, particularly when it is engaged in the uniquely sovereign function of enforcing the public law. This Court recognized these unique attributes in *Standefer* v. *United States*, 447 U.S. 10 (1980), in declining to apply the rule of nonmutual collateral estoppel announced in *Parklane Hosiery* and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), against the government in a criminal case. The Court stated, in terms that are fully applicable here (447 U.S. at 24-25):

Finally, this case involves an ingredient not present in either *Blonder-Tongue or Parklane Hosiery*: the important federal interest in the enforcement of the criminal law. *Blonder-Tongue* and *Parklane Hosiery* were disputes over private rights between private litigants. In such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation.

That is not so here. The court of appeals put the point well:

> "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is in our view neither in the best interest of the courts, nor the public." 610 F.2d, at 1093.

In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine.

The fact that this case is not a criminal prosecution does not dilute the strength of these factors. Whenever the government acts in its sovereign capacity to enforce the public laws, public policy dictates the applicability of the *Standefer* analysis. This is especially so where, as here, the government acts to ensure enforcement of the immigration and naturalization laws, which this Court

has recognized as "[a]n increasingly important interest • • • of broad public concern." *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982), slip op. 5; see also *INS* v. *Hibi*, *supra*, 414 U.S. at 8; *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981).

In addition, numerous practical and legal considerations, applicable in criminal and noncriminal cases alike, set the United States apart from any other litigant and argue strongly against the estoppel invoked by the court of appeals. The government is involved in far more litigation than any other party.[16] In 1981, for instance, the Solicitor General received recommendations respecting the desirability of appellate review of a decision adverse to the government in over 1850 cases. Second, many of the issues of greatest public importance, including constitutional issues, arise only in litigation to which the government is a party, and others are characteristically associated with government litigation. Third, the government, unlike other litigants, necessarily finds itself in litigation presenting a particular legal issue in a host of jurisdictions—indeed potentially (and not uncommonly) in every district and circuit. In such cases, which include the present one, the potential unfairness of invoking the preclusion doctrine absent mutuality (see *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14) is necessarily present, for there is a substantial likelihood that in litigating a recurring issue, the government will at some point encounter an adverse decision.

Because of these unique attributes of government litigation, application of collateral estoppel in the circumstances of cases such as the present one would substan-

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[16] In a recent year the United States was a party to 63,628 civil cases filed in the United States District Courts, 37.7% of total filings. Administrative Office of the United States Courts, *Annual Report of the Director* 224, 227 (1980). In the same year the United States was party to 4,654 and 14,854 civil cases appealed from the district courts to the courts of appeals as well as 2950 original actions to review the decision of an administrative agency. *Id.* at 203, 205.

tially disrupt the existing process of development of the law through resolution of conflicts by appeal, en banc review and certiorari, by supplanting the more flexible doctrine of *stare decisis* and the persuasive effect of decisions of coordinate courts with the rigid doctrine of issue preclusion.[17] As the American Law Institute has recognized, when "the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons * * * the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*." *Restatement (Second) of Judgments* § 29, comment i (1980).[18]

Furthermore, invocation of collateral estoppel against the government on legal issues of public importance is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for selective prosecution of appeals from adverse judgments. The government alone regularly takes into account factors other than its narrow interest in prevailing in the particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against

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[17] The court of appeals' suggestion (App. A, *infra*, 17a) that the considerations we have canvassed might be more weighty when an issue arises in two different circuits simply illustrates the court's failure to recognize the distinction between collateral estoppel and *stare decisis*. Moreover, considered within the framework usually reserved for *stare decisis*, the court's observation is unsound. Under the court of appeals' analysis the decision of a single inferior court may be binding upon a court of appeals, while the authority of decisions of one or more courts of appeals, even those rendered en banc, may be regarded as merely persuasive.

[18] The *Restatement* also cautions against use of collateral estoppel "when the issue was determined in the first action by a trial court and in the second action will probably be taken to an appellate court," and when "the issue is of general interest and has not been resolved by the highest appellate court that can resolve it." *Restatement (Second) of Judgments* § 29, comment i. The decision of the court of appeals disregards these strictures as well.

appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon a host of other factors including: a substantial measure of prosecutorial discretion, equitable and policy considerations,[19] the perceived practical importance of the decision, recognition of the limited resources of the government and sensitivity to crowded dockets of the courts.[20] As we have explained above (pages 11-12), the decision not to pursue an appeal in *68 Filipinos* was just such a decision.

Adoption of the novel rule endorsed by the court of appeals would compel the United States to reconsider this salutary practice, which benefits the public interest and facilitates sound judicial management. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue. As a result, the courts of appeals and this Court would be burdened

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[19] The United States, even as a litigant, does not abandon its responsibilities as the government. As this Court has remarked, "[t]here is, of course, no rule of law to the effect that the Government must be consistent in its stance in litigation over the years. It has changed positions before." *Barrett* v. *United States*, 423 U.S. 212, 222 n.6 (1976). See also *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978); *Dixon* v. *United States*, 381 U.S. 68, 70-75 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957). As this case illustrates, the political process by which the United States changes policies from time to time in a democratic society is itself a powerful reason to preclude collateral estoppel against the government on matters of public law. Indeed, the decision of the court of appeals permits one administration to bind its successors even on questions of constitutional law.

[20] See, *e.g.*, Note, *The Solicitor General and Intragovernmental Conflict*, 76 Mich. L. Rev. 324, 324-330 (1977); Carrington, *United States Appeals in Civil Cases*, 11 Hous. L. Rev. 1101, 1101-1105 (1974); Bork, *The Problems and Pleasures of Being Solicitor General*, 42 A.B.A. Antitrust L. J. 701 (1973); Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L. J. 1442, 1453-1457 (1969); Sobeloff, *Attorney for the Government: The Work of the Solicitor General's Office*, 41 A.B.A.J. 229 (1955).

prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved. Moreover, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. See, *e.g.*, *United States* v. *Foster Lumber Co.*, 429 U.S. 32 (1976) (rejecting the view of three courts of appeals); *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977) (rejecting the view of five courts of appeals). Plainly, there is no interest served by invocation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.[21]

2. These considerations led the Second Circuit in *Olegario* v. *United States*, *supra*, upon the very facts presented here, to refuse to apply collateral estoppel against the government. The Second Circuit explained that, "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern." 629 F.2d at 215. The Second Circuit also pointed out that the government's decision to forego further judicial review of an adverse decision, as in *68 Filipinos*, may result from a variety of factors unrelated to the legal issues in the case. "If each adverse decision were accorded the collateral estoppel effect urged * * *, the Solicitor General would be forced to seek review of cases that would not otherwise be appealed." *Ibid.* Other courts have reached similar conclusions, refusing to invoke col-

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[21] At a minimum there is no basis for the court of appeals' assertion (App. A, *infra*, 15a) that "[i]t should have come as no surprise to the government" that Judge Renfrew's decision in *68 Filipinos* would reach the claim of every Filipino veteran. *Parklane Hosiery* had not been decided at the time the *68 Filipinos* appeal was withdrawn. The proper mechanism for putting the government on notice that litigation on a particular matter will bind an entire class of litigants is to seek class action certification. See Fed. R. Civ. P. 23; *Califano* v. *Yamasaki*, 442 U.S. 682, 698-703 (1979).

lateral estoppel against the government on purely legal issues of public importance, at least absent a complete identity of parties. See, *e.g.*, *American Medical International, Inc.* v. *Secretary of Health, Education and Welfare*, 677 F.2d 118, 121-124 (D.C. Cir. 1981); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974). The decision of the court below thus stands in sharp contrast to the decisions of other courts.

To be sure, the court of appeals acknowledged that collateral estoppel might not be applicable in some government cases presenting legal issues (App. A, *infra*, 19a). But because the court below saw no "'critical' need for redetermination" of the underlying constitutional issue (*ibid.*) and no "compelling public interest in opposing the naturalization" of persons such as respondent (*id.* at 20) and believed that the equities favored respondent (*id.* at 20a-21a), it held that the government was precluded from relitigating the constitutional issues presented. None of these considerations justifies the court of appeals' conclusion.[22] As explained above (pages 18-19), the decisions of this Court, including *Hibi*, reflect that the enforcement of the naturalization laws in every individual case is of utmost public importance. Judge Renfrew's holding in *68 Filipinos* that the actions of an Attorney General taken for foreign policy reasons acknowledged to be valid effected a denial of due process is necessarily significant, without regard for the number of persons involved or the court of appeals' assessment of the equities. Moreover, while this Court's decision in *Hibi* makes clear that the equitable considerations mentioned by the court below are irrelevant to the merits of respondent's claim, it is particularly clear that these equities have no place in the calculus of decision when the

[22] The court of appeals' necessarily subjective conclusions regarding the "critical need for redetermination" and "compelling public interest" also provide no standard for accurate prediction of which legal rulings, if not appealed by the government, would be given collateral estoppel effect in the future.

issue is not whether respondent is entitled to naturalization, but only whether the United States is foreclosed from securing an adjudication of that question.

3. We have explained above that, because of the unique situation of the government in enforcing the public law, nonmutual collateral estoppel on issues of law should never be applied against the United States. But even if that were not so generally, and *Parklane Hosiery* were regarded as controlling in government litigation, the court of appeals erred in approving application of that doctrine here.

First, the Court emphasized in *Parklane Hosiery* that the doctrine of nonmutual collateral estoppel must always be applied selectively and cautiously. 439 U.S. at 329-331. The Court mentioned, for example, that issue preclusion would be inappropriate when "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330 (footnote omitted). Here, of course, as the court of appeals acknowledged (App. A, *infra*, 16a), Judge Renfrew's decision conflicts with the Second Circuit's subsequent decision in *Olegario*. See page 13, *supra*. In addition, decisions inconsistent with *68 Filipinos* have been rendered in *In re Kapili*, 473 F. Supp. 600 (E.D. N.Y. 1979); *In re Naturalization of Inton*, No. SA-79-CA-284 (W.D. Tex. July 3, 1980); *Pangilinan* v. *INS*, Pet. No. 251849 (N.D. Cal. Sept. 24, 1980), appeal pending, No. 80-4543 (9th Cir.); *Barretto* v. *United States*, Pet. No. 248806 (N.D. Cal. Aug. 15, 1980), appeal pending, No. 80-4441 (9th Cir.). In view of this division of authority, the court of appeals was plainly required to take an independent look at the merits of respondent's constitutional claim.[23]

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[23] An additional factor that should have caused the court of appeals to address the merits is the substantial tension between Judge Renfrew's conclusion that Attorney General Clark's actions denied due process to Filipino veterans and this Court's conclusion in *Hibi* that the very same actions were not affirmative misconduct. Indeed,

Other factors also should have precluded any estoppel here. As we have noted (pages 14-15 & note 15, *supra*), the court of appeals rested its decision entirely upon the preclusive effect of *68 Filipinos*, even though significant legal arguments not addressed by Judge Renfrew were presented by the government throughout the litigation of respondent's claim. The court of appeals thus effectively applied the broader res judicata ("claim preclusion") doctrine, rather than collateral estoppel, to bar all arguments the United States might raise in answer to respondent's claim. See *Allen* v. *McCurry*, 449 U.S. 90, 94 & n.5 (1980). There can be no justification for the court of appeals' failure to consider legal arguments that might have been, but were not, addressed in *68 Filipinos*.

An equally remarkable feature of the decision below is the court's conclusion (App. A, *infra*, 11a n.8) that respondent's residence in Pennsylvania during most of the time a naturalization examiner was absent from the Philippines does not serve to distinguish him sufficiently from the petitioners in *68 Filipinos* to require an independent determination of his right to naturalization. While we question whether any person who made no effort to avail himself of the opportunity for naturalization provided by Section 701 of the 1940 Nationality Act should be heard to complain of the temporary absence of a naturalization official from the Philippines, it is far clearer that persons such as respondent can make no such claim. And even if, as the court of appeals thought, the facts of this case "implicate" respondent's due process

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the arguments made in this Court by Hibi include ones virtually indistinguishable from those approved by Judge Renfrew in *68 Filipinos* but for the label used to describe them. See 72-1652 Memorandum in Opposition (at 6, 12) (1973 Term). In these circumstances, due regard for the authority of this Court's decisions required the court of appeals to treat the decision in *68 Filipinos* as one at least potentially "inconsistent with * * * [a] previous judgment[] in favor of" the United States. *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330.

rights (App. A, *infra*, 12a n.8), there is no reason whatever to conclude that the holding of *68 Filipinos*, which takes no account of these facts, precludes a determination on the merits here. By invoking collateral estoppel, the court of appeals failed to discharge its duty to determine whether, on the facts of this case, respondent is entitled to naturalization under the laws of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-3478

IN THE MATTER OF PETITION FOR NATURALIZATION OF SERGIO ELEJAR MENDOZA, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Argued and Submitted May 6, 1981

Decided April 2, 1982

Appeal from the United States District Court
for the Central District of California

Before TANG and NORRIS, Circuit Judges; and CARROLL,* District Judge.

NORRIS, Circuit Judge:

The issue raised by this appeal is whether the district court abused its discretion in collaterally estopping the government from relitigating the constitutionality of the Attorney General's decision to withdraw a naturalization examiner from the Philippines in 1945. We hold there was no abuse of discretion and affirm.

I

HISTORICAL BACKGROUND

The historical events giving rise to appellee Sergio Mendoza's claim for naturalization are undisputed.

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* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

In March, 1942, Congress amended the Nationality Act of 1940, Pub.L. No. 76-853, 54 Stat. 1137 (1940) to provide for the naturalization of non-citizens who served honorably in the United States armed forces. Section 701 exempted alien servicemen from some of the usual naturalization requirements, such as a period of residence and literacy in English. Section 702 provided for overseas naturalization of those eligible under section 701 who were in active service in the military and not within the jurisdiction of any court authorized to naturalize aliens. Section 705 provided that the "Commissioner [of Immigration and Naturalization] with the approval of the Attorney General, shall prescribe and furnish forms, and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act." The Act was subsequently amended to specify that all naturalization petitions filed under section 701 must be submitted by December 31, 1946. Act of Dec. 28, 1945, Pub.L. No. 79-270, (c), 59 Stat. 658 (1945).

Pursuant to the Act, INS officers were sent overseas to naturalize eligible members of the United States military. From 1943-46, these officers traveled from post to post through England, Ireland, North Africa and the Pacific, naturalizing servicemen. In early August, 1945, following the liberation of the Philippines, the INS designated George Ennis, Vice Consul in Manila, to naturalize Filipino servicemen under the Act.[1]

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[1] The INS and the Attorney General had concluded that members of the Army of the Commonwealth of the Philippines qualified as servicemen in the United States armed forces.

The Philippines was scheduled to become independent on July 4, 1946. Philippine Independence Act of 1934, Pub. L. No. 73-127, § 10(a), 48 Stat. 463 (1934). The Philippine government apparently feared that naturalizations under section 702 would cause large numbers of Filipinos to emigrate to the United States, draining that country of much-needed manpower. These fears were communicated by the Philippine government to the United States Department of State, which passed them on to the INS Commissioner. In September, 1945, the Commissioner wrote to the Attorney General:

> The Philippine Government again has expressed to the Department of State its concern because Filipino members of the armed forces of the United States are being naturalized even though they have always been domiciled in the Philippine Islands. . . . In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future.

Memorandum to Attorney General Tom C. Clark from INS Commissioner Ugo Carusi (September 13, 1945).

Acting upon the Commissioner's recommendation, the Attorney General revoked Vice Consul Ennis' naturalization authority and on October 26, 1945, naturalizations in the Philippines were halted. No new naturalization officer was appointed for the

Philippines until August, 1946. Thus, for nine months no INS official was present in the Philippines to implement the 1940 Act.

II

THE MATTER OF NATURALIZATION OF 68 FILIPINO WAR VETERANS

In 1975, the claims of 68 Filipino war veterans whose petitions for naturalization pursuant to sections 701-705 of the Nationality Act of 1940 had been denied by the Immigration and Naturalization Service (INS) were joined in the United States District Court for the Northern District of California. *Matter of Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal. 1975) (Renfrew, J.) (*68 Filipinos*). The veterans claimed that although sections 701-705 of the 1940 Act had expired, their petitions should be granted because the United States government had failed to station in the Philippines from October 1945 to August 1946 an INS examiner authorized to naturalize members of the American armed forces pursuant to section 702 of the Act.

In his opinion, Judge Renfrew divided the petitioners into three categories. Category I consisted of those veterans who had taken action to become naturalized prior to December 31, 1946 but had not been processed by the INS. Category II consisted of those veterans who were eligible for citizenship under the 1940 Act but did not file petitions before the Act expired. Category III included those petitioners who were unable to prove eligibility for naturalization under the 1940 Act. *Id.* at 936-37.

Judge Renfrew found that Category I veterans had been victims of "affirmative misconduct" by the INS and that the government was thus equitably estopped

from denying their petitions. In addition, Judge Renfrew held that Category I veterans had "constructively filed" their petitions for naturalization prior to the expiration of the 1940 Act, thus complying with the 1946 statutory deadline for filing. *Id.* at 937-40.

Judge Renfrew next addressed the claims of the Category II veterans. As a threshold matter, he ruled that their claim that their due process rights had been violated by the government's decision to withdraw naturalization authority from Vice Consul Ennis was not a non-justiciable "political question." [2] *Id.* at 943-48. He next held that the constitutional claims were not barred by *INS* v. *Hibi*, 414 U.S. 5, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973).[3] 406 F.Supp. at

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[2] Judge Renfrew applied the six-pronged test set forth in *Baker* v. *Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). Noting that it is error to suppose that all cases touching upon foreign affairs are nonjusticiable, 406 F.Supp. at 945, he concluded that the judicial standards of equal protection and due process are well-developed; that the case involved no "initial policy determination of a kind clearly for nonjudicial discretion," since Congress had already established the relevant policy by enacting Sections 701-705 of the 1940 Act; that there was no especial need for unquestioning adherence to a political decision already made since it was unlikely that the foreign policy of the United States would be affected by the court's consideration of the merits in that case, and that there was little likelihood that "multifarious pronouncements by various departments on one question" would embarrass the United States. *Id.* at 945-47.

[3] In *INS* v. *Hibi*, a Filipino who had served in the United States military sought naturalization under section 701 of the 1940 Act. The veteran claimed that the Government was equitably estopped from relying on the expiration date of the 1940 Act (December 31, 1946) because it had failed to advise him, during the time he was eligible, of his right to naturaliza-

942-43. Finally, Judge Renfrew held that the government's withdrawal of its naturalization examiner from the Philippines during 1945-46 had deprived Category II veterans of their due process rights. Applying the equal protection component of the Due Process Clause of the Fifth Amendment, Judge Renfrew reasoned that:

> although the Court has no doubt that the actions of the Commissioner of the INS were motivated by reasonable concern for the maintenance of amicable relations between the United States and the Philippine Islands, that concern alone, when considered in light of the suspect nature of the classification herein, and the strictness of the applicable constitutional standard, is insufficient justification for violating petitioners' rights.

Id. at 951.

Accordingly, Judge Renfrew also granted the petitions for the Category II veterans.

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tion, and because the government had failed to provide a naturalization officer in the Philippines during the time he was eligible. 414 U.S. at 5-8, 94 S.Ct. at 19-21. The Court rejected this claim, ruling that while it remained an open question whether affirmative misconduct on the part of the government might estop it from denying citizenship, the failure to fully publicize the rights accorded war veterans under the 1940 Act and the failure to station an authorized naturalization officer in the Philippines was not such misconduct. *Id.* at 8-9, 94 S.Ct. at 21-22.

Hibi was a summary reversal without the benefit of briefing or oral argument. The sole issue was one of equitable estoppel, and was therefore not, in Judge Renfrew's view, dispositive of the petitioners' constitutional claims in *68 Filipinos*. 406 F.Supp. at 942-43.

Category III veterans were given 90 days to produce proof that they had served in the United States armed forces in the Philippines and were thus eligible for naturalization under the 1940 Nationality Act. *Id.* at 951. After 90 days, no such proof was forthcoming, and their petitions were denied.

The government filed a notice of appeal in *68 Filipinos* but subsequently withdrew its appeal.

III

DR. MENDOZA

Petitioner, Sergio Elejar Mendoza, is a 73-year old Filipino citizen currently residing in this country. He served in the armed forces of the United States as a medical doctor from December 1, 1941 until June 30, 1946. In 1942, he was captured by the Japanese and survived the notorious Bataan Death March. In February or March, 1945, Dr. Mendoza was released by the Japanese. In the fall of 1945, he was sent to the United States for army medical training, and spent approximately six months in Pennsylvania. Thereafter, he returned to the Philippines, where he stayed until his discharge from the military. At no time during 1945-46 did Dr. Mendoza make any efforts to become an American citizen.[4] In 1978, he filed for naturalization as a Filipino war veteran pursuant to sections 701-706, claiming that he was denied due process of law by the government's actions in 1945-

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[4] Such inaction is not surprising since many Filipino soldiers imprisoned by the Japanese were unaware of their right to apply for naturalization. *See, e.g., Olega[illegible] v. United States*, 629 F.2d 204, 211 (2nd Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981).

46.[6] Judge Lucas found that Dr. Mendoza was a Category II veteran for the purpose of applying Judge Renfrew's decision in *68 Filipinos*, and he held the government collaterally estopped from relitigating the issues decided in *68 Filipinos*. The government appealed Judge Lucas' order granting Dr. Mendoza citizenship. We note jurisdiction under 28 U.S.C. § 1291.

IV

OTHER FILIPINO WAR VETERAN CASES

Prior to Judge Lucas' decision in Dr. Mendoza's case, two other district judges in this circuit held that the government is collaterally estopped by *68 Filipinos* from relitigating the constitutional issue raised by the Filippino war veterans. *See Petition of Nisperos*, 471 F.Supp. 296 (C.D.Cal. 1979); *Petition of Crispulo Columna Colmenar*, No. 308-P-22551 (S.D. Cal. March 20, 1979). Shortly after Dr. Mendoza's petition was granted, however, the Second Circuit, in *Olegario* v. *United States*, 629 F.2d 204 (1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1513, 67 L.Ed.2d 814 (1981), held that the government was not collaterally estopped by *68 Filipinos* from contesting Olegario's naturalization petition; on the merits, the Second Circuit disagreed with Judge Renfrew in *68 Filipinos* and held that the government's decision to withdraw naturalization authority from Vice Consul Ennis violated no due process rights of Filipino veterans.

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[6] Mendoza last entered the United States on June 12, 1975, and was ordered to depart on June 29, 1978. Were this court to reverse the judgment below granting his petition for naturalization, he would be subject to deportation under 8 U.S.C. § 1251(a)(9) (1976).

V

COLLATERAL ESTOPPEL

In the seminal case of *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 332, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court held that federal trial courts have broad discretion to apply collateral estoppel offensively in the interest of avoiding needless litigation. In this case, we hold that Judge Lucas did not exceed the bounds of his discretion in estopping the government from relitigating, in opposition to Dr. Mendoza's naturalization petition, the constitutional issues decided in *68 Filipinos*. We agree with Judge Lucas that under the guidelines adopted in *Parklane Hosiery*, "offensive collateral estoppel would not in any way be unfair to the government" in this case. Accordingly, we affirm the judgment granting Dr. Mendoza's petition for naturalization.

A.

The question of applying collateral estoppel offensively arises "when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party." [4] *Parklane Hosiery*, 439 U.S. at 326 n.4, 99 S.Ct. at 649 n.4. *See also Blonder-Tongue*

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[4] In approving the use of collateral estoppel offensively, the Court in *Parklane Hosiery* sounded the death knell to the common law doctrine of mutuality of parties. Under the mutuality doctrine, one party could preclude another party from relitigating an issue that had been litigated in a previous suit only if both had been parties to the original action. Thus, under the mutuality doctrine, the government would not have been foreclosed in this case from relitigating issues decided adversely to it in *68 Filipinos* because Dr. Mendoza was not a party to that action.

Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971); *Montana* v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *Hinkle Northwest, Inc.* v. *S.E.C.*, 641 F.2d 1304 (9th Cir. 1981).

Writing for the Court in *Parklane Hosiery*, Justice Stewart stressed the need for caution in using collateral estoppel offensively because of the risk of unfairness to a defendant. First, the availability of offensive collateral estoppel may encourage potential plaintiffs to sit on the sidelines, taking a no risk "wait and see" attitude in the hope that another plaintiff will obtain a favorable judgment that can be invoked offensively against the defendant. Second, a defendant with little at stake in the first action, and thus little incentive to defend vigorously or to appeal an adverse judgment, might find himself, in a subsequent unforeseen action involving higher stakes, estopped from relitigating an issue decided against him in the earlier action. Third, the offensive use of collateral estoppel raised the specter that a defendant faced with identical claims by multiple plaintiffs may prevail in several actions, then be faced with an inconsistent adverse judgment that can be used offensively by future plaintiffs. Finally, offensive use of collateral estoppel may be unfair where the defendant in the first action is forced to defend in an inconvenient forum or where the second action affords the defendant significant procedural opportunities not available in the first action.

Notwithstanding these acknowledged risks of unfairness to a defendant, the Court was persuaded that the dual purposes of collateral estoppel—"protecting litigants from the burden of relitigating an identical issue . . . and promoting judicial economy by prevent-

ing needless litigation," 439 U.S. at 326, 99 S.Ct. at 649—justified a rule permitting discretionary use of offensive collateral estoppel in the federal courts. Thus, the Court concluded that "[t]he preferable approach for dealing with these problems in the federal courts is not to preclude the offensive use of collateral estoppel, but to grant the trial courts broad discretion to determine when it should be applied." *Id.* at 331, 99 S.Ct. at 651. In exercising that discretion, trial judges should be guided by the general rule that "where a plaintiff could easily have joined in the earlier action, or where . . . the application of offensive collateral estoppel would be unfair to a defendant," *id.*, the defendant should be permitted to relitigate despite a prior adverse determination.[7]

B.

The government contends that the application of offensive collateral estoppel by Judge Lucas as a basis for granting Dr. Mendoza's petition was grossly unfair and an abuse of discretion.[8] To support this con-

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[7] In *Parklane Hosiery*, the district court refused to apply collateral estoppel offensively on grounds that it would deprive the defendant of its right to trial by jury. The Second Circuit reversed, applying collateral estoppel, and the Supreme Court affirmed. The Court reasoned, *inter alia*, that it was not unfair to collaterally estop Parklane Hosiery from relitigating, in a shareholders' class action, a determination in a prior action brought by the SEC that a proxy statement issued by Parklane Hosiery was false and misleading.

[8] As a preliminary matter, the government also argues that the facts of Dr. Mendoza's case are quite different from *68 Filipinos*, since Dr. Mendoza spent approximately six months in the United States and was therefore not in the Philippines during much of the time that Vice Consul Ennis' naturalization authority was revoked. It is impossible to tell from Judge

tention, the government focuses on the Solicitor General's decision to withdraw the appeal in *68 Filipinos*,[9] allowing the judgment in that case to become final. The government claims that it grossly underestimated the number of persons who would be eligible for naturalization under *68 Filipinos*, and that the appeal was withdrawn "without a complete understanding of the implications of [Judge Renfrew's] decision." With no citation to the record, the government claims that it appeared at the time it withdrew the appeal that only "a fairly small number" (some 25,000 Filipino veterans, by an unidentified State Department estimate, plus derivatively eligible relatives) would be eligible for naturalization under *68 Filipinos*. Brief for Respondent-Appellant at 22. The government goes on to contend, still without record support, that the Solicitor General, acting on unspecified "new information," later reversed his position and decided to perfect appeals in all subsequent cases, including Dr. Mendoza's. *Id.*

Renfrew's opinion the number of months that each Category II veteran in *68 Filipinos* was eligible for United States citizenship under the 1940 Act but was deprived of the opportunity to become naturalized because of the Commissioner's decision to withdraw the examiner from the Philippines. In any event, the record shows that Dr. Mendoza was in the Philippines for as much as three months, during which time he was eligible under sections 701-705 but unable to become naturalized because no naturalization examiner was present. We think this is a sufficient period to implicate his due process rights and to place him in the same situation as other Category II veterans.

[9] The Solicitor General, subject only to the general supervision and direction of the Attorney General, authorizes or declines to authorize the appeal of judgments adverse to the government. 28 C.F.R. § 0.20(b) (1980).

The government fails to provide any record support for its claim that offensive collateral estoppel was unfairly applied by Judge Lucas in granting Dr. Mendoza's petition. We are not advised of the source of or basis for the original State Department estimate of 25,000 eligible Filipino veterans; nor are we advised of the nature or source of the "new information" claimed to be the basis of the Solicitor General's change in position. All we have from the government is an unsupported claim that 60,000-80,000 Filipino veterans "may yet" seek naturalization under *68 Filipinos*.[10]

Even were we to accept the government's claim of error in its original estimate of eligible Filipino veterans, the new numbers of 60,000 to 80,000 give no meaningful indication of the consequences of barring relitigation of the issues decided in *68 Filipinos*. In basing its argument of unfairness on the number of persons eligible for naturalization under *68 Filipinos*, the government makes no distinction between those Filipino veterans who, like Dr. Mendoza, are likely to

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[10] "Yet the courts now invoke offensive collateral estoppel to hold that the Government is powerless to resist further petitions by Filipino war veterans who may yet number 60,000 to 80,000." Brief for Respondent-Appellant at 20. We assume, although the government does not tell us, that the figures of 60,000-80,000 are based on the INS research referred to by INS Commissioner Castillo in his 1978 testimony to Congress. *See* Slip op. p. 1395, p. ——, *infra; Hearings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 2nd Sess. 272-73 (1978). We note, moreover, that Commissioner Castillo gave no indication in his testimony that those figures were not available to the Solicitor General at the time he decided, on the recommendations of the INS, to withdraw the appeal in *68 Filipinos*.

petition for naturalization, and those who have remained in the Philippines and have no interest in leaving their homeland to become United States citizens. Indeed, what is most astonishing about the government's vision of a horde of Filipino veterans applying for citizenship in reliance on *68 Filipinos* is what the government has failed to tell us: how many persons have in fact petitioned for naturalization on the basis of *68 Filipinos* since the judgment became final in 1977. We are dealing with a class of persons who served in the Philippines Army some 40 years ago. Common sense tells us that the actual number likely to petition for naturalization in reliance on *68 Filipinos* is no more than a small fraction of the undocumented numbers cited by the government. In fact, this was the case as of 1978, when Leonel Castillo, then Commissioner of INS, testified before Congress:

> Our independent research indicates that if all of the veterans followed the same mortality rates and so on, that demographically there shouldn't be more than 60,000 to 80,000 *assuming they all wanted to come*. . . .
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> [*A*]*nd yet our experience in the aftermath of the 1968* [*sic*] *Filipino War Veterans case is that we've had fewer than 100 applicants, so there really has been no big change. The number has been very, very small.*

Heargings Before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 273 (1978) (emphasis added). Surely, if the number of petitioners had increased dramatically since 1978, the

government would have advised the court of that significant fact.

Moreover, whatever the government's original estimate of the number of eligible Filipino veterans, the government had every incentive to litigate vigorously the issues in *68 Filipinos* and to prosecute an appeal of the adverse trial court judgment. This is not a case where an original suit is followed by an unforeseen action involving much higher stakes. *See Parklane Hosiery*, 439 U.S. at 330, 99 S.Ct. at 651. On the contrary, in *68 Filipinos* the government faced 68 separate naturalization petitions joined together in one action, not a lone veteran seeking citizenship. It should have come as no surprise to the government that the effects of Judge Renfrew's decision would reach not only the 68 Filipinos before the court, but all similarly situated Filipino veterans, whatever their number.

It is not for this court to speculate on the reason the Solicitor General reversed his position after withdrawing the government's appeal in *68 Filipinos*. We have only the record before us to go on, and that record is bare of any support for the government's proffered explanation that it did not fully appreciate until a later time the implications of Judge Renfrew's decision. We thus conclude that the government had a full and fair opportunity to litigate the issues in *68 Filipinos* and that the government's decision to withdraw its appeal does not make it unfair to estop the government from relitigating the identical issues in an effort to defeat Dr. Mendoza's naturalization petition. *See United States* v. *Munsingwear*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed 36 (1950); *Starker* v. *U.S.*, 602 F.2d 1341, 1349-50 (9th Cir. 1979); *Winters* v. *Lavine*, 574 F.2d 46, 62-63 (2nd Cir. 1978); *Continental Can Co.* v. *Marshall*, 603 F.2d

590, 596 (7th Cir. 1979); *Restatement* (Second) of Judgments § 68.1(a) Comment a (Tent. Draft No. 4, 1977).[11]

C.

We recognize that the Second Circuit in *Olegario*, *supra*, recently refused to estop the government from relitigating the constitutional issues decided in *68 Filipinos* and, disagreeing with Judge Renfrew, ruled in favor of the government on the merits.[12] We do not believe, however, that *Olegario* compels reversal of the trial court judgment granting Dr. Mendoza's naturalization petition.[13] As the Ninth Circuit has

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[11] Nor, under the guidelines of *Parklane Hosiery*, do we find other circumstances that warrant relitigation of the issues decided adversely to the government in *68 Filipinos*.

The record gives no indication that in 1975 Dr. Mendoza was aware of the *68 Filipinos* litigation and adopted a "wait and see" attitude in the hope of using a favorable decision as a basis for estopping the government from challenging his petition for naturalization. *See Parklane Hosiery*, 439 U.S. at 329-30, 99 S.Ct. at 650-51.

Furthermore, the government was not required to defend the *68 Filipinos* case in an inconvenient forum, and there are no significant procedural opportunities in this action that were not available in the earlier *68 Filipinos* action. *See id.*, 439 U.S. at 330-31, 99 S.Ct. at 651-52.

[12] The district court, apparently without considering collateral estoppel, had adopted Judge Renfrew's "able opinion" and granted Olegario's petition on the merits. 473 F.Supp. 185, 186 (S.D.N.Y. 1979).

[13] We note that *Olegario* was not decided until after Judge Lucas issued his order granting Dr. Mendoza's petition in this case; thus, Judge Lucas could not have considered *Olegario* in exercising his discretion to apply collateral estoppel offensively against the government. We find no abuse of discretion on the record before him, however, and conclude that the subsequent inconsistent decision does not require reversal.

recently noted, "[t]he fact of inconsistent decisions is a relevant, but not always dispositive, factor to be considered in the exercise of discretion." *Western Oil & Gas* v. *United States E.P.A.*, 633 F.2d 803, 809 (9th Cir. 1980). *See also Crawford* v. *Ranger Ins. Co.*, 653 F.2d 1248, 1251-52 (9th Cir. 1981).

Inconsistent judgments may render collateral estoppel unfair. In *Parklane Hosiery*, 439 U.S. at 330 n.14, 99 S.Ct. at 651 n.14, the Court recited Professor Currie's famous example of a railroad collision involving 50 passengers. Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 Stan.R.Rev. 281, 304 (1957). In that example, the railroad wins 25 suits, and a plaintiff wins suit 26. It would be unfair, of course, to estop the railroad in suits 27 through 50 on the basis of the apparently fortuitous jury decision in suit 26. Similarly, in *Commissioner* v. *Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 720, 92 L.Ed. 898 (1948), the Court reasoned that it would be unjust to give collateral estoppel effect to a judgment against taxpayer A in subsequent tax years, while similarly situated taxpayers, not collaterally estopped by the judgment against taxpayer A, are accorded more favorable tax treatment because of a change in the tax law.

In this case, there is only one inconsistent judgment, and the inconsistency stems from a conflict between the courts of two circuits, not from an apparently fortuitous jury decision or an intervening statutory change in the law.[14] Any unfairness oc-

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[14] **Moreover, *68 Filipinos* was litigated in the courts of the Ninth Circuit. Whatever the value of permitting another circuit to take a fresh look at the legal issue involved, thereby perhaps facilitating Supreme Court review, *see American Medical International Inc.* v. *Secretary of HEW*, —— F.2d**

casioned by application of collateral estoppel in this case is no greater than the unfairness that results whenever circuits disagree; thus, we do not believe that the existence of an inconsistent second circuit decision outweighs the factors favoring collateral estoppel in this case.

Moreover, we find the Second Circuit's reasoning unpersuasive on the collateral estoppel issue. The Second Circuit accepts, without analysis, the government's characterization of the case as one raising issues of national significance. ("In contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern." 629 F.2d at 215.) We recognize that the government is frequently involved in cases raising issues of great public importance, and that in such cases the public interest in permitting the government to relitigate those issues may outweigh the public interest in avoiding needless litigation. We simply do not believe, as appears below, that this is such a case.

D.

The government's final line of argument is that *Parklane Hosiery* should be limited to private litigants. It is by now well settled, however, that collateral estoppel may be involved against the government, *see Montana* v. *United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), and may be invoked not only on issues of fact, but on mixed issues of law and fact or pure issues of law. *See Montana* v. *U.S.*, *supra*; *Carr* v. *District of Columbia*, 646 F.2d

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——, at ——-—— No. 79-1460, slip op. at 10-11 (D.C.Cir. Aug. 14, 1981), we think these policies lose much of their force in a case brought in the same circuit as the initial litigation. *See Starker* v. *U.S.*, 602 F.2d at 1348-49 n.5.

599, 608 (D.C.Cir. 1980); *Starker* v. *U.S.*, 602 F.2d at 1344-48. Moreover, the Ninth Circuit has already approved the use of collateral estoppel offensively against the government. *Hinkle Northwest*, 641 F.2d at 1308-10; *Starker* v. *U.S.*, 602 F.2d at 1350.

Nonetheless, the Supreme Court has cautioned that "(u)nreflective invocation of collateral estoppel against parties with an ongoing interest in constitutional issues could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana* v. *U.S.*, 440 U.S. at 163, 99 S.Ct. at 978. Similarly, courts have recognized that, as the institutionalized representative of the public interest, the government is sometimes involved in cases of far-reaching national significance, where the policies of conserving judicial resources and preventing parties from taking a "second bite of the apple" are outweighed by the societal interest in "getting a second opinion." *See American Medical International*, slip op. at 1393-1398; *Western Oil & Gas*, 633 F.2d at 809-10; *Porter & Dietsch Inc.* v. *FTC*, 605 F.2d 294, 299-300 (7th Cir. 1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980). The Restatement (Second) of Judgments, § 68.1(e) (Tent. Draft No. 4, 1977), for example, states that issue preclusion is inapplicable where "there is a clear and convincing need for a new determination of the issue (1) because of the potential adverse impact of the determination on the public interest. . . ."

We find no "critical" need for redetermination of the Filipino war veterans' rights. Despite the government's rhetoric, the record is devoid of evidence that Judge Renfrew's decision in *68 Filipinos* has had, or can be expected to have, any significant effect

on the number of veterans who become United States citizens.[15] Moreover, even if the number of Filipino veterans petitioning for naturalization on the basis of *68 Filipinos* were larger than the record would indicate, we can discern no compelling public interest in opposing the naturalization of those veterans. The persons who may take advantage of *68 Filipinos* are World War II veterans who are likely to be well over 60 years of age; they fought side-by-side with United States troops in the Pacific, and many, like Dr. Mendoza, suffered imprisonment by the Japanese and survived the notorious Bataan Death March. In appreciation for their sacrifices, Congress voted to admit those veterans to United States citizenship over 30 years ago. As former INS Commissioner Castillo observed in his testimony to Congress concerning the Solicitor General's decision to withdraw the appeal in *68 Filipinos:* '[i]t seem[s] . . . that just as a matter of simple justice, that we should honor our commitment to people that we agreed to naturalize thirty years ago." *Hearings Before the Subcomm. on Im-*

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[15] Moreover, it is a significant limiting factor that the "legal matter raised in the second proceeding . . . involve[s] the same set of events" as that involved in the first. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601-602, 68 S.Ct. 715, 721-92, 92 L.Ed. 898 (1948); *see United States* v. *Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262 (1924), *explained in Montana* v. *U.S.*, 440 U.S. at 162-63, 99 S.Ct. at 978. Both the facts giving rise to Dr. Mendoza's cause of action and the underlying claims are the same as those in *68 Filipinos*. While we therefore have no occasion to decide whether the government could be estopped from relitigating legal issues determined in *68 Filipinos* in a subsequent case involving a different cause of action, we note that factors favoring relitigation would assume greater weight in a new factual setting. *See Montana* v. *U.S.*, 440 U.S. at 162-63, 99 S.Ct. at 978.

migration, *Citizenship and International Law*, *supra*, at 272.

In light of the foregoing analysis, we hold that the district court did not abuse its discretion in estopping the government from relitigating, in opposition to Dr. Mendoza's petition for naturalization, the constitutional issues decided in *68 Filipinos*.

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISRICT OF CALIFORNIA

Petition No. 406054

PETITION FOR NATURALIZATION
OF SERGIO ELEJAR MENDOZA

[Filed Jan. 4, 1979]

ORDER GRANTING PETITION

Petitioner is a citizen of the Philippines who served honorably in the Armed Forces of the United States from 1941 to 1946. His petition was filed under §§ 701 and 702 of the Naturalization Act of 1940 as amended in 1942. The government opposes the granting of this petition on the grounds that the rights petitioner possessed under the Act expired in 1946 when petitioner left the Armed Forces. As petitioner can make no valid claim for citizenship under law in force at the time he filed his petition, the government argues that his petition must be denied under 8 U.S.C. § 1421(e). Petitioner raises Constitutional arguments which he submits allow him to make this petition under the 1942 Amendments. For the reason stated below the Court grants the petition on other grounds and does not reach the Constitutional issues or other merits of the petition.

Matter of Naturalization of 68 Filipino War Vetrans, 406 F.Supp. 931 (N.D. Ca., 1975) involved

three categories of veterans asserting rights under the 1942 Amendments. Petitioner's position is the same as those petitioners in "Category II" in *68 Filipino War Veterans*. That is, petitioner served in the United States Armed Forces in the Philippines during the time when the United States government withdrew the authority of the INS special agent there to naturalize petitioners under the 1942 Amendments. The District Judge in *68 Filipino War Veterans* found that the Category II petitions should be granted. This Court holds that the policy of offensive collateral estoppel as recently refined by the Supreme Court in *Parklane Hosiery Co., Inc.* v. *Shore*, 99 S.Ct. 645 (1979) is apposite and will be applied to estop the government from challenging the petition here.

Although plaintiff probably could have joined as a petitioner in *68 Filipino War Veterans*, his failure to do so is not suggested to have been the result of collusion, bad faith, or other improper motive. Indeed, it has not been suggested that petitioner was aware of the suit at all. Thus it would not be unfair to allow petitioner to make use of that decision. Second, the government surely had as much incentive to litigate the issues in *68 Filipino War Veterans* as in this case. The government has not pointed to any factor indicating that it did not litigate that case fully. Third, the use of offensive collateral estoppel here will not produce a decision inconsistent with other judgments. In fact, the decision here will square not only with *68 Filipino War Veterans* but with the decision of Chief Judge Schwartz in *Petition of Crispulo Columna Colmenar*, Pet. No. 308-P-22551, (S.D. Ca., 20 March 1979). Finally no procedural advantages are available to the government in this case that were unavailable in *68 Filipino War Veterans*. In sum, offensive

collateral estoppel would not in any way be unfair to the government.

Under the guidance of *Parklane Hosiery*, then, the Court holds that the government is estopped from challenging this petition by the decision in *Matter of Naturalization of 68 Filipino War Veterans* and, accordingly, the petition is granted.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order on counsel of record in this action.

Dated: June 4, 1979

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Petition No. 406054

PETITION FOR NATURALIZATION
OF SERGIO ELEJAR MENDOZA

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE DESIGNATED NATURALIZATION EXAMINER

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

I

The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examination upon petitions for naturalization, respectfully submits that the above named petitioner, a native and national of the Philippines, age 70 years, presently in the United States in the status of overstayed visitor for business, filed the petition for naturalization numbered above on May 10, 1978, under Section 701 of the Nationality Act of 1940, as amended (Act of March 27, 1942 (56 Stat. 182)).

The question presented is whether the petitioner is now eligible to be naturalized under the statute cited above relating to service in the Armed Forces of the United States during World War II, and which statute expired by its own terms on December 31, 1946.

II

The petitioner served honorably in the Armed Forces of the United States from December 1, 1941 to June 30, 1946. His service was with the Philippine Commonwealth Army and he enlisted in the Philippines. Petitioner was never lawfully admitted to the United States for permanent residence. Verification of his service and its honorable character has been obtained from official records.

The petitioner herein has offered no evidence to establish that he attempted to apply for or even inquired about naturalization prior to the expiration of the law on December 31, 1946. Further, petitioner has testified that he left the Philippines in September, 1945 for the United States to go to school under United States Army authority, and did not return to the Philippines until at least June, 1946.

There are no other issues, such as good moral character or attachment to the principles of our constitution, in this case. The sole issue is eligibility for naturalization under the provisions of the Nationality Act of 1940, as amended (supra), and under the current Immigration and Nationality Act, Section 329 (8 U.S.C. 1440).

Section 701 of the Act of March 27, 1942 sought to reward through naturalization, those *who were then serving* or who had served honorably on active duty with the Armed Forces of the United States. Section 702 of that Act (56 Stat. 183) provided for the overseas naturalization of those then serving. The provisions of Sections 701 and 702 expired on December 31, 1946. During the period, designated government officials traveled to various parts of the world to examine applicants and actually confer naturalization administratively. This was the first of only two

times during our nation's history that such administrative procedures were available. The Philippines was among the overseas locations visited by those officers following the recovery of those Islands by friendly forces. However, on the representations of Philippine officials, the government official was withdrawn for a period of approximately nine months, from late 1945 to mid 1946. Such a situation did not occur elsewhere. Thus, for this period, naturalization was not available to qualified servicemen then *in the Philippines*.

III

Section 701 of the Act of March 27, 1942 called only for honorable services in the United States Armed Forces and did not require, as does its current successor statute, Section 329 of the Immigration and Nationality Act (8 U.S.C. 1440), that the serviceman be enlisted in a qualifying geographic area or that he have been at any time lawfully admitted to the United States for permanent residence. Those geographically qualifying areas are the United States, the Canal Zone, American Samoa and Swains Island. Most, if not all, of the Filipino nationals had either enlisted in the Philippines in such units as the Philippine Scouts (part of the United Armed Forces) or being members of the Commonwealth Army of the Philippines had been incorporated by executive and military orders into the United States Armed Forces. Others served in guerrilla units recognized by the United States Armed Forces.

Within recent years, the situation of another Filipino native and veteran of World War II was considered by the United States Supreme Court (*INS* v. *Marciano Haw Hibi*, 414 U.S. 5 (1973)). In *Hibi*,

the Supreme Court considered the petitioner's argument that the government was estopped from using the cut-off date of December 31, 1946 as spelled out in Section 701 of the 1940 Act since the government, by withdrawing its examiner from the Philippines for a period of several months, had effectively denied Filipino veterans the opportunity to apply at that time. Hibi had not applied nor tried to apply prior to December 31, 1946. The Supreme Court was not persuaded by that argument.

In a split decision, the Court ruled that, since Hibi had not applied for naturalization until many years after 1946, the withdrawal of the examiner did not rise to the level of "affirmative misconduct" required to successfully invoke estoppel against the government. Even though the Court concluded that naturalization under Section 701 was no longer available to Hibi on the issue of estoppel, there was no hint of what the decision might have been had Hibi attempted to apply before that section's expiration.

Subsequently, a number of Filipino World War II veterans residing in San Francisco, California filed petitions for naturalization claiming eligibility under the same provision. Their petitions were joined and, notwithstanding the Supreme Court's decision in *Hibi*, the United States District Court found the majority of the 68 Filipinos eligible for naturalization under Section 701 of the Nationality Act, as amended. *See Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

This Court will note that the San Francisco Court divided the 68 petitioners into three categories. In the first category were those veterans who proved to the Court that they had applied or made a reasonable effort to apply before December 31, 1946 but were

denied the opportunity to file formal petitions because of the government's withdrawal of its overseas officer. The Court, distinguishing *Hibi*, found that these persons had "constructively" filed petitions and that the government was estopped, notwithstanding *Hibi*, from now denying them naturalization.

In the second category were those veterans who convinced the Court that they would have applied had the officer not been withdrawn. These persons, like Hibi, took no steps to apply until many years later. With respect to these, the Court found that the veterans had been denied due process, an issue not raised or decided in *Hibi*. It reasoned that, since Filipinos were, before July 4, 1946, non-citizen nationals of the United States, they owed permanent allegiance to the United States. In turn, they were entitled to due process.

Finally, the third category included several Filipinos who could not produce the critical proof of qualifying honorable and active service in the United States Armed Forces during the World War II period. The Court gave this group additional time within which to produce that proof. Evidence was not forthcoming and the petitions of those in the third category were dismissed.

As to categories one and two, the government sought appeal. The appeal was grounded primarily on the fact that the petitioners' cases were not essentially distinguishable from that in *Hibi*. Briefing was completed and the appeal was awaiting oral argument in the Ninth Circuit Court of Appeals.

In a memorandum dated September 21, 1977, the Commissioner of the Immigration and Naturalization Service recommended to the Department of Justice that the appeal be withdrawn. Officials at the De-

partment of Justice agreed and in an order dated November 30, 1977 the Court of Appeals granted the government's motion to dismiss. The order made no comment one way or the other on the merits of the case(s).

Upon reexamination, the government has adopted the reasoning of the San Francisco Court only as to Filipino World War II veterans in the first category.

It is however the government's position that the naturalization of those veterans in the second category is unsupported by statute and precedent. Notwithstanding the decision in the San Francisco case, notwithstanding the government's withdrawal of its appeal in that case, and for the following reasons, the government must recommend that this petition for naturalization be denied.

The current Immigration and Nationality Act of 1952 was amended by the Act of September 26, 1961, Sec. 17 (75 Stat. 656). Specifically, Section 310 of the 1952 Act was amended by the addition of Subsection (e) thereof (8 U.S.C. 1421(e)). The amendment provided that, notwithstanding the savings clause of the Act, all petitions for naturalization filed after the effective date of the amendment would be determined in accordance with the requirements of the 1952 Act still in effect. As indicated earlier, the basic and current Act requires, under Section 329 (8 U.S.C. 1440), that qualified servicemen or veterans must have enlisted (or reenlisted, by judicial interpretation) in certain geographical areas or have been admitted to the United States for lawful permanent residence.

The District Court, in the cases of the 68 veterans, did not discuss Section 310(e) in reaching its conclusion as to either categories one or two. If category one veterans are determined to have "construc-

tively filed" their petitions in 1946, Section 310(e) does not apply, and the savings clause, Section 405(b) (8 U.S.C. 1101 note), would allow their petitions to be heard and determined in accordance with the requirements of law in effect when such petitions were filed.

The present petitioner, however, made no attempt to inquire or apply until well after the enactment of Section 310(e), and as such is bound by the requirements of the present statute (8 U.S.C. 1440). Since he was neither enlisted nor inducted in the qualifying geographical area outlined above and is not a lawful permanent resident, the requirement is not met. Further, during a large majority of the time when authority to naturalize in the Philippines was revoked (October, 1945 until August, 1946), petitioner was either in the United States as a student officer under United States Army authority, or in transit back to the Philippines.

Interestingly, in a decision dated October 17, 1975, just over three weeks prior to the District Court's judgment in the cases of the 68 Filipino veterans, the Ninth Circuit Court of Appeals ruled that Section 310(e) of the Act (supra) barred the naturalization of a veteran whose eligibility was claimed on the basis of the provisions of a prior statute, *United States* v. *Pasion*, 524 F.2d 249 (9th Cir. 1975).

Further, the situation of category two veterans is indeed indistinguishable from that in *Hibi* (supra). Since no attempt was made to inquire or apply prior to December 31, 1946, the government's failure to have an examiner in the Philippines did not amount to the "affirmative misconduct" necessary to invoke estoppel, nor was it a denial of due process.

Thus it is the position of the government that naturalization under Section 701 of the Nationality Act of 1940 is not available to a Filipino World War II veteran who cannot prove that he made a reasonable inquiry or application prior to the expiration of the above section on December 31, 1946.

Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 U.S.C. 1446), I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

(a) The petitioner filed a petition for naturalization on May 10, 1978 under the provisions of Section 701 of the Nationality Act of 1940 as amended;

(b) The petitioner is a Filipino national who served honorably on active duty with Armed Forces of the United States from December 1, 1941 to June 30, 1946 by reason of his service in the Philippine Commonwealth Army during that period; he was enlisted in the Philippines;

(c) The petitioner was either in the United States as a student officer under United States Army authority or in transit back to the Philippines during a large majority of the time when authority to naturalize in the Philippines was revoked;

(d) The petitioner is not a lawful permanent resident of the United States;

(e) The petitioner has offered no evidence to show that he inquired about naturalization or applied for naturalization prior to December 31, 1946.

CONCLUSION OF LAW:

(a) The petitioner is ineligible for naturalization under the provisions of Section 701 of the Nationality Act of 1940 as amended because of the decision of the United States Supreme Court in *INS* v. *Hibi*, 414 U.S. 5 (1973), and because of current Section 310(e) of the Immigration and Nationality Act, as amended (8 U.S.C. 1421(e)), notwithstanding the decision of the United States District Court, San Francisco, California in *Matter of Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931 (N.D. Cal. 1975).

V

I recommend that this petition for naturalization be DENIED pursuant to the facts and law outlined above.

Respectfully submitted,

/s/ John B. Bartos
JOHN B. BARTOS
General Attorney (Nationality)
Designated Naturalization Examiner

Nov. 29, 1978

Date

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3478

MISC #7783 MML

IN THE MATTER OF PETITION FOR NATURALIZATION OF SERGIO ELEJAR MENDOZA, PETITIONER-APPELLEE

vs.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Appeal from the United States District Court
for the Central District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A TRUE COPY
ATTEST Oct. 22, 1982
PHILLIP B. WINBERRY
Clerk of Court

by /s/ Oscar Tagle
Deputy Clerk

Filed and entered April 2, 1982

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3478

IN THE MATTER OF PETITION FOR NATURALIZATION OF SERGIO ELEJAR MENDOZA, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

[Filed Jul. 22, 1982]

Before: TANG and NORRIS, Circuit Judges; and CARROLL,* District Judge

ORDER

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* The Honorable Earl H. Carroll, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX F

Sep. 21, 1977

To: Philip Wilens, Chief
Government Regulations and
Labor Section Criminal Division,
Department of Justice

From: Leonel J. Castillo, Commissioner
Immigration and Naturalization Service

Subject: In the Matter of Petitions for Naturalization of 68 Filipino War Veterans Pursuant to Sections 701-702, Nationality Act of 1940, 406 F. Supp. 931 (N.D. Cal. 1975); Appeal filed January 9, 1976

INTRODUCTION

The Commissioner has reviewed the decision of the District Court and wishes to withdraw the Service recommendation that the case be appealed.

BACKGROUND

The petitioners are Filipino veterans of World War II who would have been eligible for naturalization under special World War II legislation that expired on December 31, 1946. Section 701 of the Nationality Act of 1940, 56 Stat. 182 *et seq.*, as amended, 8 U.S.C. 1001 (1940 ed supp. V) exempted alien servicemen who served outside the continental limits of the United States from certain of the usual requirements for naturalization, including those of a period of residence in the United States and literacy in English. Section 702 provided for the naturalization overseas

of persons eligible for naturalization under section 701 who, while serving honorably in the U.S. military, were not within the jurisdiction of any court authorized to naturalize aliens.

At the request of the Philippine Government, which feared a mass exodus, the Service had withdrawn naturalization facilities from the Philippines during a nine-month period before the statute expired. Eight of the petitioners in this case (Category I) had submitted timely applications to the Service in the Philippines, only to have them rejected. Fifty-three petitioners (Category II) were unaware of their eligibility before the law expired. The seven petitioners in Category III were in the same position as those in Category II, except that they had not shown that they served in the United States armed forces as required by section 701.

Section 310(e) of the Immigration and Nationality Act, 8 U.S.C. 1421(e) requires all petitions for naturalization filed after the enactment of that section (September 26, 1961) to be heard and determined in accordance with the requirements of that Act. Section 329 of the Act, 8 U.S.C. 1440 presently regulates the naturalization of aliens on the basis of active duty service in the armed forces of the United States. That section provides for the summary naturalization of an alien who served in the armed forces before December 31, 1946, if ". . . (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence." 8 U.S.C. 1440(a)(2). None of the petitioners in the case at bar have been admitted for permanent residence. Further, they cannot obtain that status because the immigration quota for their country is oversubscribed.

DISTRICT COURT DECISION

In *United States Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973), the Supreme Court held that the principle of estoppel is not applicable against the Government to enable a Philippine national whose right to petition for U.S. citizenship expired in 1946 to now apply for such citizenship under the provisions of the Nationality Act of 1940. *Hibi* claimed estoppel on the ground that during the time in question the American authorities did not adequately publicize the rights accorded under the Act of 1940 and did not have available an authorized naturalization representative in the Philippine Islands during all the time those rights were available. The Supreme Court rejected the claim, ruling that estoppel against the Government could be premised only on affirmative misconduct of its officials. The District Court, however, held that the rejection of the Category I applications constituted "affirmative misconduct" within the meaning of *Hibi*, and concluded that this estops the Service from raising the expiration of the World War II special legislation. The District Court found that since all the Category I petitioners had filed the appropriate forms for commencing naturalization proceedings, they would be deemed to have constructively filed petitions for naturalization within the required time. *In re Vacontios' Petition*, 155 F. Supp. 427 (S.D.N.Y. 1957).

As to the Category II petitioners, the District Court held that the Service's discrimination against eligible veterans in the Philippines, while making naturalization facilities available to eligible veterans elsewhere, constituted a denial of equal protection of the laws and of due process forbidden by the Constitution.

The petitioners in Category III, having failed to produce the necessary proof of their military service within 90 days from the date of the court's order, had their petitions denied on April 1, 1976.

GOVERNMENT'S ARGUMENT

The Government presented four principal reasons why the petitions should be denied:

(1) that the *Hibi* decision by the Supreme Court was *res judicata* against the application of the doctrine of estoppel on grounds of failure to maintain a naturalization examiner in the Philippines between October 1945 and August 1946. The court reasoned, however, that since *Hibi* was a summary reversal limited to the estoppel issue, it had less precedential value than an opinion on the merits. Further, since the constitutional claim raised here was neither presented to nor considered by the Supreme Court, *Hibi* does not bar petitioners from raising the constitutional claim.

(2) that due process rights did not apply in the Philippines after the March 24, 1934 Philippine Independence Act because the Philippines was a territory, and not a part, of the United States. The court found that the Act did not transform the Philippines into a foreign country into which the guarantees of the Constitution did not penetrate, notwithstanding the fact that the Philippines was treated as a foreign country for limited purposes (e.g., immigration, tariffs on products). Filipinos were not aliens resident in a foreign country. Owing allegiance to the United States (48 Stat. 456 § 2(a)(I)), they were nationals entitled to claim the protection of the fundamental guarantees of the United States Constitution

for events occurring prior to the Philippine Independence on July 4, 1946.

(3) that the decision to honor the request of the Philippine Government was a matter of foreign relations policy, an executive function not reviewable by the courts. While conceding that the Government's decision was motivated by foreign policy considerations, the court, relying on *Baker* v. *Carr*, 369 U.S. 186 (1962), found that this case presents a justiciable question.

(4) that the nine-month absence of the naturalization examiner did not deny petitioners due process of law. Petitioners argued that the Commissioner's decision to withhold from servicemen stationed in the Philippines the opportunity to become naturalized discriminated against the Filipinos as a class. As the only class forced to suffer such discrimination, petitioners contended that they were denied equal protection of the laws. This equal protection claim is based on the principle that the unequal application of a law among those entitled to be treated alike may violate the Due Process Clause of the Fifth Amendment. Petitioners also claimed that the discrimination was based on race, alienage, or nationality—suspect classifications—which must be subjected to strict judicial scrutiny and can only be justified by compelling government interest. In order to justify the use of a suspect classification, the Government must show that "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary * * * to the accomplishment' of its purpose or the safeguarding of its interest *In re Griffiths*, 413 U.S. 717, at 721-722. The court found, however, that the Government failed to show a compelling national interest to justify withdrawing

the naturalization examiner from the Philippines while summary overseas naturalization of alien veterans was taking place during that period in other countries.

DISCUSSION

When the Congress enacted the provisions of section 701-705, it was aware of the number of persons who would be entitled to receive the benefits. Certainly the Filipinos were intended to be among the major beneficiaries of these provisions since there were more Filipino servicemen in the U.S. armed forces than any other ethnic group. The "national interest" was expressed by Congress in the enactment of this legislation providing for the naturalization of all qualified war veterans. The actions taken by the Service not only failed to further the intent of Congress but appear to have been wholly inconsistent with it.

The desire expressed by the Philippine Government in 1945 to hold onto its younger manpower in the post-war period is hardly valid any longer. "The Court does not believe that Filipino-American relations in particular, or the foreign policy of the United States in general, are likely to be affected adversely by judicial consideration of the merits of the instant case. As the Government repeatedly called to the attention of the Court the executive action complained of here occurred nearly thirty years ago and reflected decisions based upon fact and policy objectives then existent. The Court does not perceive any reason why it must continue to adhere unquestionably to these much earlier executive decisions." 406 F. Supp. 931, 947.

The Service withdrew its naturalization facilities from the Philippines and from no other area where

alien servicemen were on active duty in the armed forces of the United States. Since the decision by the District Court concerns only Filipino veterans of World War II, it will not be a precedent for future litigation.

The essence of due process is fundamental fairness. It is grossly unfair of the Government to raise the barrier of 8 U.S.C. 1421(e) (which requires naturalization petitions to be determined in accordance with the current Immigration and Nationality Act) to bar the naturalization of these war veterans when it was the Government itself which prevented them from applying at a time when there was no such barrier.

A relatively low number of Filipino nationals are affected by the decision. While there are some 25,000 certifiable veterans residing in the Philippines, it is unlikely that most of them would come to the United States at this late stage in their lives. Since the fall of Saigon in 1975, the United States has admitted 145,000 Indochinese under the emergency parole authority extended to the Attorney General. The President and the Commissioner have pledged themselves to a course of compassion and amnesty. The withdrawal of the Government's appeal in this case would be in keeping with the policy of the Administration.

FOR THE COMMISSIONER

David Crosland
General Counsel

APPENDIX G

STATUTES AND REGULATION INVOLVED

1. 28 C.F.R. 0.20 provides in pertinent part:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by the Solicitor General, in consultation with each agency or official concerned:
>
> * * * * *
>
> (b) Determining whether, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing *en banc* and petitions to such courts for the issuance of the extraordinary writs) * * *.

2. Sections 701, 702, and 705 of the Nationality Act of 1940, as amended, ch. 199, 56 Stat. 182-183, 8 U.S.C. (Supp. V 1945) 1001, 1002 and 1005, provided in pertinent part: [1]

> Sec. 701. * * * [A]ny person not a citizen regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and Who shall have been at the time of his enlistment or induction a resident thereof and who (a) was lawfully admitted into the United States, including its Territories and possessions, or (b) having entered the United States, including its Territories and possessions, prior to September 1, 1943, being unable to establish lawful admission

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[1] The Nationality Act of 1940 was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280.

into the United States serves honorably in such forces beyond the continental limits of the United States or has so served may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention, no certificate of arrival for those described in group (b) hereof, and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; * * * *Provided, however,* That * * * (3) the petition shall be filed not later than December 31, 1976. * * *

Sec. 702. During the present war, any person entitled to naturalization under Section 701 of this Act, who while serving honorably in the military * * * forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of

any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship; * * *.

Sec. 705. The Commissioner, with the approval of the Attorney General, shall prescribe and furnish such forms and shall make such rules and regulations, as may be necessary to carry into effect the provisions of this Act.

3. Section 310(e) of the Immigration and Nationality Act of 1952, as added, Pub. L. No. 87-301, 75 Stat. 656, 8 U.S.C. 1421(e), provides:

Notwithstanding the provisions of section 405(a)[2] any petition for naturalization filed on or after September 21, 1961, shall be heard and determined in accordance with the requirements of this subchapter.

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[2] Section 405(a) of the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 280, was a general savings clause that preserved the legal effectiveness of certain acts taken under provisions of prior law that were in other respects superseded by the 1952 Act.

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